

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Terrance Williams,	:	
	:	CIVIL ACTION
	:	
Petitioner,	:	
v.	:	NO. 93-3334
	:	
Martin Horn, Commissioner of	:	
the Pennsylvania Department of	:	
Corrections; Benjamin Varner,	:	
Superintendent of the State	:	
Correctional Institution at	:	
Greene,	:	
	:	
Respondents.	:	
	:	

MEMORANDUM

ROBERT F. KELLY, J.

AUGUST 23, 2000

Before this Court is a counseled Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, filed by Terrance Williams ("Petitioner"), who is presently incarcerated at the State Correctional Institution at Greene, Pennsylvania. On April 20, 2000, United States Magistrate Judge Thomas J. Reuter filed a Report and Recommendation ("R & R"), to which Petitioner filed objections on June 2, 2000. After a thorough and independent review of the record in this case, for the reasons that follow, the petition is denied.

I. BACKGROUND.

At approximately 1:00 a.m. on December 25, 1982, Petitioner and a co-defendant broke into an elderly couple's home in the West Mount Airy section of Philadelphia, Pennsylvania,

robbed them at gunpoint, and then stole their car. Petitioner's defense consisted largely of mistaken identity. At the time he committed these crimes, Petitioner was a few months shy of his seventeenth birthday. He was certified for trial as an adult by the Honorable John R. Meade of the juvenile court. On March 1, 1984, after a non-jury trial before the Honorable Michael E. Wallace, Petitioner was convicted of two counts each of robbery, recklessly endangering another person, terroristic threats, and simple assault, and one count each of burglary, criminal conspiracy, theft and unauthorized use of a motor vehicle. He was sentenced to 12 ½ to 25 years imprisonment.¹

Petitioner raises the following four claims in his petition: (1) he was denied due process of law when he was certified to adult court without the juvenile court having made findings of fact and conclusions of law or providing a statement of reasons for the certification, and former counsel were ineffective for failing to raise this claim at trial, in post-verdict motions or on appeal; (2) he was denied due process by the manner in which pretrial identification proceedings were conducted and by the Commonwealth's failure to provide him with a

¹ While Petitioner was awaiting trial in this case, he murdered Herbert Hamilton. While he was on bail awaiting sentencing in this case, he murdered Amos Norwood. He was sentenced to death in the Norwood murder case, and the convictions in the present case and the one involving Herbert Hamilton were used as aggravating circumstances to secure that sentence.

proper lineup pursuant to court order, and former counsel were ineffective for failing to litigate this claim; (3) he was denied due process because Judge Wallace, his trial judge, had been taking bribes at the time of Petitioner's trial; and (4) he was arbitrarily denied a record-based direct appeal by the state courts and former counsel's ineffectiveness.² We will examine

² With regard to Petitioner's claims of ineffective assistance of counsel, the Supreme Court of the United States set forth a two-prong test for evaluating such claims in Strickland v. Washington. Strickland, 466 U.S. 668 (1984). A finding against Petitioner under either prong is sufficient to find for the government. United States v. Ciancaglini, 945 F. Supp. 813, 816 (E.D.Pa. 1996).

First, Petitioner must show that counsel's performance was deficient, meaning that counsel made errors so serious as to deprive Petitioner of the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. This evaluation must be based upon the facts of the case at the time of counsel's conduct. Id. at 690. "[T]he right to effective assistance of counsel does not guarantee that an attorney will never err." Diggs v. Owens, 833 F.2d 439, 446 (3d Cir.), cert. denied 485 U.S. 979 (1988). Therefore, to satisfy this prong, Petitioner must show that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. Id. at 688. However, "[a]n attorney is presumed to possess skill and knowledge in sufficient degree to preserve the reliability of the adversarial process and afford his client the benefit of a fair trial." Diggs, 833 F.2d at 444-445. Consequently, great deference is given in evaluating counsel's performance, and there is a strong presumption that counsel's challenged actions constitute sound trial strategy. Strickland, 466 U.S. at 689.

Second, even if the court finds counsel's conduct to have been deficient, Petitioner must nevertheless show that his defense was prejudiced by the deficient performance in order to justify setting aside the verdict. United States v. Griffin, No. Crim. 91-612, 1993 WL 34927, at *5 (E.D.Pa. Feb. 9, 1993). To establish the requisite prejudice under this second prong, Petitioner must show that counsel's errors were so serious as to deprive him of a fair trial, i.e., one having a reliable result. Strickland, 466 U.S. at 694. In order to do so, Petitioner must

each of Petitioner's claims individually.³

II. STANDARD OF REVIEW.

"[A] district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Martinez v. Chesney, et al., No.Civ.A. 97-6280, 1999 WL 722818, at *1 (E.D.Pa. Sept. 15, 1999)(quoting 28 U.S.C. § 2254(a)). If objections are filed to the magistrate judge's report, the district court is required to make a de novo determination of those portions of the report or recommendation

establish a reasonable probability that but for counsel's errors, the result of the trial would have been different. Id. A reasonable probability is one which is sufficient to undermine confidence in the outcome of the trial. Id. This second prong must be evaluated by a totality of the circumstances existing at the time of the trial since "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Griffin, 1993 WL 34927, at *5 (quoting Strickland, 466 U.S. at 696).

Accordingly, meritless claims fail as challenges of ineffectiveness of former counsel for failing to preserve or raise these claims. See United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999)("There can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument"); Martinez v. Chesney, No.Civ.A. 97-6280, 1999 WL 722818, at *3 (E.D.Pa. Sept. 15, 1999)(holding counsel cannot be held ineffective for failing to raise meritless claims since the result of the proceeding would not have been different had the claims been pursued)(citing Strickland v. Washington, 466 U.S. 668 (1984)).

³ The Commonwealth argues that in addition to being meritless, all of Petitioner's claims are procedurally defaulted. We will address the merits of Petitioner's claims, as that determination is clearly dispositive of his claims.

to which objections are made. Johnson v. Faus, No.Civ.A. 93-6949, 1994 WL 230179, at *1 (E.D.Pa. May 27, 1994). The Court may accept, reject or modify part or all of the magistrate judge's findings and recommendations. Id. (citing 28 U.S.C. § 636(b)). However, although review is de novo, the court is permitted, by statute, to rely upon the magistrate judge's proposed findings to the extent that, within its discretion, it deems proper. Id. (citing States v. Raddatz, 447 U.S. 667, 676 (1980)).

III. DISCUSSION.

A. Certification to Adult Court.

Courts have interpreted 42 Pa.C.S. § 6355, which governs juvenile certification proceedings in Pennsylvania⁴, to provide that a juvenile is entitled to a hearing and statement of reasons for certification which demonstrate that the juvenile court gave careful consideration to the certification question. Kent v. United States, 383 U.S. 541 (1966); United States ex rel. Turner v. Rundel, 438 F.2d 839, 842 (3d Cir. 1971); Commonwealth v. Deppeller, 460 A.2d 1184, 1187 (Pa. 1983). The statement must set forth the basis for the order with enough specificity to permit meaningful review. Deppeller, 460 A.2d at 1187; Commonwealth v. Lux, 445 A.2d 185, 187 (Pa. 1982); Commonwealth

⁴ This statute is modeled according to the due process requirements set forth in Kent v. United States, 383 U.S. 541 (1966).

v. Stokes, 421 A.2d 240, 243 (Pa. 1980).⁵ If the lower court

⁵ 42 Pa.C.S.A. § 6355 provides, in pertinent part:

(a) **General Rule.**--- After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this Commonwealth, the court before hearing the petition on its merits may rule that this chapter is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if all of the following exist:

(1) The child was 14 or more years of age at the time of the alleged conduct;

(2) A hearing on whether the transfer should be made is held in conformity with this chapter.

(3) Notice in writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.

(4) The court finds:

(i) that there is a prima facie case that the child committed the delinquent act alleged;

(ii) that the delinquent act would be considered a felony if committed by an adult; and

(iii) that there are reasonable grounds to believe all of the following:

(A) That the child is not amenable to treatment, supervision or rehabilitation as a juvenile through available facilities, even though there may not have been a prior adjudication of delinquency. In determining this the court shall consider the following factors:

Age.

Mental Capacity.

Maturity.

The degree of criminal sophistication exhibited by the child.

Previous record, if any.

The nature and extent of any prior delinquent history, including the success or failure of any attempts by the Juvenile Court to rehabilitate the child.

Whether the child can be rehabilitated prior to the expiration of the Juvenile Court jurisdiction.

Probation or institutional reports, if

does not provide sufficient reasons for the conclusion that the juvenile is not amenable to treatment or rehabilitation as a juvenile, an appellate court will remand for a new certification hearing. Government of the Virgin islands, In the Interest of M.B., A Minor, 122 F.3d 164, 170 (3d Cir. 1997).

The juvenile court record in this case does not contain a formal statement of Judge Meade's reasons for certification, and the transcripts of the amenability portion of the certification hearing before Judge Meade were lost. A remand took place in this case, after which a reconstruction hearing was held from August to October, 1987 in the Philadelphia Court of Common Pleas before the Honorable Levy Anderson.⁶ During the reconstruction hearing, there was testimony by the former

any.

The nature of the circumstances of the acts for which the transfer is sought.

Any other relevant factors.

(B) That the child is not committable to an institution for the mentally retarded or mentally ill.

(C) That the interests of the community require that the child be placed under legal restraint or discipline or that the offense is one which would carry a sentence of more than three years if committed as an adult.

(b) Chapter not applicable following transfer.— The transfer terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition.

⁶ Judge Meade was no longer sitting on the bench at that time.

Assistant District Attorney in this case and Judge Meade's former law clerk indicating that Judge Meade made the requisite findings to certify Petitioner as an adult during the certification proceedings. However, although the reconstruction hearings were transcribed, Judge Anderson did not provide a statement of reasons for certification. It is not possible to obtain a statement of reasons for certification from either Judge Meade or Judge Anderson, as both are now deceased.

The Pennsylvania Superior Court considered this dilemma in its opinion on Petitioner's PCRA appeal. It found that the situation had been dealt with in the only feasible manner, the only option being for an independent jurist to review the record to see if certification was proper.⁷ The Honorable Genece E. Brinkley, the PCRA court, conducted this independent review and made the appropriate findings. Judge Brinkley's findings were affirmed by the Superior Court on appeal. Moreover, in preparing the R & R, Magistrate Reuter himself reviewed the propriety of Petitioner's certification to adult court.

Notwithstanding the review of the Superior Court, of Judge Anderson at the reconstruction hearing, of Judge Brinkley on the PCRA appeal, and of Magistrate Reuter in the R & R, and

⁷ The Superior Court decided a second reconstruction hearing was not a plausible option because so much time had passed since the original one that even if witnesses were still available, their memories were likely to have faded.

without asserting that he was actually ineligible for certification, Petitioner argues that the juvenile court's alleged failure to provide a statement of reasons for certification is an indelible due process violation and calls for no less than vacation of the judgment and dismissal of the indictment. He relies on Kent v. United States, 383 U.S. 541 (1966). Interpreting the requirements of the Juvenile Court Act, the Kent court emphasized that certification proceedings must satisfy "the basic requirements of due process and fairness," and must also be pursuant to a "full investigation" and "meaningful review." Id. at 550. The court elaborated that

Meaningful review means that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of reasons motivating the waiver, including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it assume that "full investigation" has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

Id. at 561. The Kent court's concern that the juvenile in that case had been deprived of due process was warranted. In that case, there was no certification hearing, no findings, no

psychiatric review of the juvenile, and the judge had no contact with the juvenile, his counsel, or his parents. Id. at 546. The court found that the almost complete lack of an examination of the juvenile's circumstances prior to certification violated the juvenile's due process rights. By contrast, in the instant case, Petitioner's due process rights were not compromised. There was a certification hearing, there was psychiatric review of Petitioner, and although not developed into a conventional statement of reasons, the juvenile court's findings were made on the record. There was also a transcribed reconstruction hearing in this case in which it was determined that Petitioner's certification was proper. The PCRA Court also made the requisite findings. Kent does not require a formal statement of reasons, but rather instructs that no waiver should be accomplished without a full investigation and meaningful review. Id. at 561. We conclude that the judicial review by the juvenile court and beyond in this case was sufficient to satisfy the due process requirements of Kent. Accordingly, this claim lacks merit and is therefore denied.⁸

Moreover, applying the factors to be considered under the certification statute, see supra, pp.5-7 n. 4, the record in this case reveals that the certification was supported by

⁸ Because this claim lacks merit, former counsel could not have been ineffective for failing to litigate it. See, supra, p. 3 n.2.

adequate evidence that Petitioner was not amenable to treatment and rehabilitation. As Magistrate Reuter observed, Petitioner was almost seventeen years old at the time he committed the crimes. Therefore, the amount of time during which Petitioner could be treated in the juvenile system was limited. Moreover, the crimes were committed in a sophisticated manner. Petitioner, along with his co-defendant, wore make-up to conceal his identity, broke into a home in the middle of the night, and held the elderly victims at gunpoint, firing a gun three times into a wall to ensure complicity from the victims. Petitioner threatened to kill one of his victims by shooting her in the head, and ordered her to cover her face so she would not see his face. He and his co-defendant spent one hour in the victims' home, ransacking it.

Moreover, although Petitioner's school records indicated that he was capable of performing satisfactory work, his performance was inconsistent and he had a high number of unexcused absences. He had a prior conviction for burglary and had not been successfully rehabilitated in the juvenile system. Although Petitioner did call some character witnesses at the certification hearing who testified that he had a good reputation in the community, some of these witnesses did not know he had a prior burglary adjudication. Notably, the juvenile court had ordered psychological reports for Petitioner prior to his

certification hearing, which resulted in determinations that he was eligible for certification. Accordingly, there is sufficient evidence that Petitioner was properly certified as an adult. This claim is denied.

B. Pretrial Identification Proceedings and Lineup.

1. The Lineup.

Petitioner had a court-ordered lineup on the morning of his preliminary hearing. He personally selected the other individuals in the lineup. However, the victims were unable to identify Petitioner. The defense highlighted this fact during trial. The Commonwealth then attempted to rebut the reliability of the lineup, alleging that the non-identification was due to poor lighting conditions.

Petitioner argues that his due process rights were violated because he was "in effect" denied a lineup. Specifically, he claims that in "contravention of the spirit of the court order," the Commonwealth "dashed together" the lineup without proper lighting conditions, and then "used this failure to challenge the non-identification of Petitioner." (Pet's Objections to R & R at pp. 45-46.) However, this claim is unavailing. Judge Wallace, unpersuaded by the Commonwealth's attack on the reliability of the lineup, specifically stated that the conditions of the lineup were typical.

Moreover, Petitioner's assertion that he was denied

"his right to due process and a reliable determination of guilt or innocence" is also without merit. First, the lineup did not, in fact, produce an identification of Petitioner. Moreover, during this non-jury trial, the trial judge had discretion as to how much weight to give a lineup, and was not persuaded by the Commonwealth's attack on its reliability. Therefore, it did not contribute to an unreliable finding of Petitioner's guilt. Rather, Judge Wallace found that there was enough other evidence to convict Petitioner.⁹ Accordingly, this claim is without merit.

2. Reliability of Victims' and Police Officer

Creighton's In-court Identifications of Petitioner.

Petitioner next makes an objection to the in-court identifications of him made by his victims and by Police Officer

⁹ There was substantial evidence indicating Petitioner's guilt in this case. A police officer who observed Petitioner for several minutes after he and his co-defendant left the victims' home identified Petitioner. The victims heard Petitioner's co-defendant call him "Terry." The goods stolen from the victims' home were found in Petitioner's bedroom minutes after the robbery. Finally, when arrested, Petitioner had the same kind of rouge on him that the perpetrators had worn to conceal their identity.

Moreover, the fact that the trial judge believed the lineup to have been properly conducted, notwithstanding the Commonwealth's arguments to the contrary, evidences that the lineup operated, if at all, to Petitioner's benefit since it did not produce an identification of Petitioner, rather than the Commonwealth's.

Creighton. He first argues, under Foster v. California¹⁰, that the victims' in-court identifications of him were the product of prior suggestive identification procedures in violation of his rights to due process. He asserts that in addition to being unable to identify Petitioner in the lineup, the victims were unable to identify him during an "in-court preliminary hearing encounter." He claims that it was only after these two encounters that the victims provided a positive identification of Petitioner at his pre-trial hearing which was incorporated into his trial, which he claims is a highly suggestive forum. He asserts that because the victims were unable to identify him in prior confrontations, the in-court positive identification was "based upon the suggestive out-of-court identifications, even though those prior identifications did not result in a positive identification."

The mere fact that a pre-trial identification takes place in a suggestive forum is not enough reason to exclude an in-court identification. Petitioner claims, however, that the victims' failure to identify Petitioner in either the suggestive preliminary hearing or in the lineup, combined with the relatively brief view they had of him at the scene, preclude a finding of any independent basis for their in-court

¹⁰ Foster v. California, 394 U.S. 440 (1996), held that a suggestive pre-trial procedure violates due process even if it does not lead to immediate identification of the defendant.

identification of him.

It is true that if an in-court identification has an independent basis, it should be admitted. In determining whether an "independent basis" exists, the United States Supreme Court has held that a court should consider: (1) the amount of time the victims had to view the criminal during the crimes; (2) their degree of attention; (3) the accuracy of the witness' prior description of the defendant; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. Neil v. Biggers, 409 U.S. 188, 199-200 (1972). We agree with Magistrate Reuter that, applying these factors, the victims in this case had an independent basis for their in-court identification of Petitioner. Petitioner was present in the victims' house for approximately an hour committing the crimes, he threatened the victims from a close distance, both victims showed absolute certainty in their identification of him at trial, and they both positively identified him in a prompt on the scene showup immediately after his arrest.¹¹ Commonwealth v. Holland, 389 A.2d 1026 (Pa. 1978)(independent basis found where witness had only a momentary view of defendant despite witness' failure to identify defendant at a preliminary hearing); Commonwealth v.

¹¹ Petitioner conspicuously fails to address the fact that this almost immediate post-arrest identification occurred.

Wilcox, 392 A.2d 1294 (Pa. 1978)(witness' in-court identification of defendant after viewing him for ten seconds sufficient); Commonwealth v. Bradford, 451 A.2d 1035 (Pa.Super. 1982)(victim's view of defendant's facial features at close range for three to four seconds while chasing him immediately after being robbed was sufficient to render in-court identification admissible); Commonwealth v. Butler, 512 A.2d 667 (Pa.Super. 1986)(victim's in-court identification had sufficient independent basis where victim viewed defendant's face at close range for five seconds); Commonwealth v. Woods, 418 A.2d 1346 (Pa.Super)(en banc), app. dismissed, 445 A.2d 106 (Pa. 1982)(victim's brief view of defendant under adequate lighting was sufficient independent source for her in-court identification); Commonwealth v. Townsend, 421 A.2d 452 (Pa. Super. 1980)(witness' view of defendant's face for only a matter of seconds from a short distance in daylight was sufficient independent basis); Commonwealth v. Rose, 401 A.2d 1148 (Pa. Super. 1979)(victim's ten second view of assailant was sufficient independent source for in-court identification). Accordingly, Petitioner's attempt to characterize the victims' encounter with him as incapable of providing an independent basis for their in-court identifications is unpersuasive.

With regard to Officer Creighton, Petitioner argues that Officer Creighton's post-arrest identification of Petitioner

in an alleged "station house show-up" was suggestive and led to a likelihood of mistaken identity. Approximately one hour after Petitioner's arrest, Officer Creighton entered the Northwest Detectives Unit and recognized Petitioner there as one of the perpetrators he had seen fleeing from the victims' stolen car. Petitioner claims that Officer Creighton's "brief view" of Petitioner running from the victims' stolen car and while chasing him on foot is insufficient to provide an independent basis for his subsequent in-court identification of Petitioner. Therefore, Petitioner asserts that the in-court identification of Petitioner was based upon the alleged improper "station house show-up."

Officer Creighton's observation of Petitioner exiting and running from the victim's car while he chased him on foot was an adequate independent basis for his subsequent in-court identification of Petitioner. See Bradford, 451 A.2d 1035 (victim's view of defendant's facial features at close range for three to four seconds while chasing him immediately after being robbed sufficient to render in-court identification admissible); Commonwealth v. Jenkins, 335 A.2d 463, 467-68 (Pa.Super. 1975)(identification of defendant by police officer within two hours after the crime was committed was properly admitted as independent basis for officer's in-court identification where officer had opportunity to observe the defendant before he escaped).

Moreover, we agree with Magistrate Reuter that Officer Creighton's presence at the Northwest detectives Unit was not an improper show-up. Further, even if it were to be considered a show-up, a police station is not a suggestive environment for a police officer as it might be for a lay person. See Commonwealth v. Toro, 638 A.2d 991, 1001 (Pa.Super. 1994) ("The concerns applicable to a one on one identification of an accused are simply not present [where] the identification was made by a trained police officer who witnessed the crime and had an adequate opportunity to observe the appellant"); Jenkins, 335 A.2d at 467 (police officers are not subject to "pressures . . . to cooperate with the police by confirming their suspicions.") Accordingly, this claim is denied.¹²

C. Judicial Bias.

Petitioner next argues that he was denied due process of law because Judge Wallace, his trial judge, was removed from the bench for taking bribes in 1983 and 1985. He argues that even if Judge Wallace did not take bribes in his case, the fact that he did so in other cases violates the due process rights of all criminal defendants whose cases were before him. He claims this bribe-taking is evidence of judicial bias, and requests discovery and an evidentiary hearing to develop this claim. The

¹² Moreover, again, counsel could not have been ineffective for failing to litigate this meritless claim. See, supra, p.3 n.2.

Commonwealth argues that Judge Wallace was not found to have taken bribes by the Supreme Court, but rather only to have accepted a monetary gift from a potential litigant, the Roofers' Union, for future special consideration, but that there was no finding of any intent to take action in favor of the Roofers' Union in a specific case.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Rather, the petitioner seeking discovery to support a judicial bias claim must make a sufficient factual showing to establish good cause. Id. "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Id. (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)).

In Bracy, the judge at issue had been found by the Supreme Court to have been "thoroughly steeped in corruption." Id. at 909. There was evidence that he had taken bribes in murder cases other than the petitioner's. There was other evidence of the judge's corruption besides bribe-taking, such as his significant relationships to organized crime and the fact that he himself had offered bribes to judges when he was a

practitioner. The Bracy court held that the petitioner had shown good cause to obtain discovery to develop his claim of judicial bias. Id. Indeed, the court emphasized that the petitioner in that case had "support[ed] his discovery request by pointing not only to [his trial judge's] conviction for bribe taking in other cases, but also to additional evidence . . . that lends support to his claim that [the judge] was actually biased in petitioner's own case." Id.

In the instant case, Petitioner has failed to make a sufficient factual showing of judicial bias to justify his request to obtain discovery. Petitioner's attempt to liken this case to Bracy is unpersuasive. Petitioner merely asserts that in this case, as in Bracy, the judge was "adjudicated as having taken bribes at the time of petitioner's trial" and that he has "asserted that there was reason to believe the judge had engaged in competency bias." (Pet.'s Objections to R & R at pp. 55-56). Petitioner ignores the salient distinctions in Bracy which lead to the conclusion that good cause for discovery does not exist here. In fact, in the instant case, Judge Wallace was not actually convicted of taking bribes at all. Petitioner has provided no other evidence that Judge Wallace may have been biased in his own case other than to suggest that his predisposition to accepting bribes gave him an incentive to cover his "corrupt tracks" by treating litigants harshly in other

cases. Id. at 51. Petitioner provides no further authority to support for his request for discovery under Bracy on this claim. Therefore, this claim is denied.

D. Denial of Record-Based Appeal.

Petitioner claims that his trial counsel failed to file proper post-trial motions, which led to the Superior Court's refusal to rule on three out of four of Petitioner's claims on appeal, deeming them waived for not having been properly preserved. The one claim that the Superior Court did rule on related to whether Judge Wallace should have recused himself, which Petitioner refers to as an "extra-record" claim. All of Petitioner's remaining, so-called "record-based" claims, were deemed waived. Accordingly, Petitioner claims that trial counsel's failure to file proper post-verdict motions rendered his direct appeal "doomed from the outset." He characterizes this alleged ineffectiveness as tantamount to a denial of his direct appeal.¹³ He also alleges a denial of due process due to the state courts' arbitrary failure, "under these circumstances" to restore Petitioner's right to a record-based direct appeal.

As Magistrate Reuter pointed out, Petitioner had the burden of establishing that the claims he would have raised on

¹³ Petitioner also argues that appellate counsel was ineffective for failing to raise the issue of this alleged ineffectiveness of trial counsel, and for filing a direct appeal rather than seeking restoration of Petitioner's appellate rights nunc pro tunc.

direct appeal had arguable merit. In Commonwealth v. Wilkerson, 416 A.2d 477, 479 (Pa. 1980), the Pennsylvania Supreme Court observed the distinction between the failure to raise an issue in post-verdict motions or on appeal, and the outright denial of the right to an appeal. Specifically, the court stated that

If counsel fails to raise an issue in post-verdict motions or on appeal, he is deemed to be ineffective only if the issue is of arguable merit On the other hand, an accused has an absolute right to appeal . . . and counsel can be faulted for allowing that right to be waived unless the accused himself effectively waives the right . . . This requirement that counsel protect the appellate right of an accused extends even to circumstances where the appeal is "totally without merit. . . . This is not to say counsel must advance baseless claims in an appeal; rather, under such circumstances, he must protect the accused's right through the procedure enunciated in Anders v. California.

Id. (internal citations omitted). Therefore, a petitioner is relieved of the burden of establishing that the claims he would have raised on appeal were of arguable merit only when he has actually been denied his right of appeal. Counsel's failure to merely raise certain issues is insufficient. Petitioner admits that one of his claims was ruled upon on direct appeal. He has provided no authority for his argument that the failure to preserve "record-based" claims where an "extra-record" claim is ruled upon is "the functional equivalent of no appeal." (Pet.'s Objections to R & R at 37). In this case, Petitioner was, at most, deprived of the opportunity to raise certain claims in his appeal, but he was not denied an appeal outright. Accordingly,

he must establish that his claims were of arguable merit. Petitioner claims that his certification claim and the identification claims are of arguable merit. As discussed above, they are not. Therefore, this claim is denied.¹⁴

An appropriate Order follows.

¹⁴ Petitioner asserts that Magistrate Reuter "all but found that [trial counsel] performed deficiently." (Pet.'s Objections to R & R at 37 n. 28.) However, Magistrate Reuter merely pointed out that while Petitioner had arguably established that counsel's performance fell below an objective standard of reasonableness, but had clearly not shown the requisite prejudice. (R & R at 24-25). Therefore, even had Magistrate Reuter specifically found that counsel's performance was deficient, which he did not, Petitioner's claims still fail under Strickland. Accordingly, no due process violation arose out of the state courts' "failure to restore his right to a record-based direct appeal."

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Martin Horn, Commissioner of	:	
the Pennsylvania Department of	:	
Corrections; Benjamin Varner,	:	
Superintendent of the State	:	
Correctional Institution at	:	
Greene,	:	
	:	
Respondents.	:	
	:	

ORDER

AND NOW, this 23rd day of August, 2000, upon careful and independent consideration of the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 filed by the Petitioner, Terrance Williams, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter, and of Petitioner's Objections thereto, it is hereby ORDERED that:

1. Petitioner's objections to the Report and Recommendation are DENIED.
2. The Report and Recommendation is APPROVED and ADOPTED.
3. The Petition for Writ of Habeas Corpus is DISMISSED.

4. There is no probable cause for appeal.

BY THE COURT:

Robert F. Kelly, J.